STATE OF MICHIGAN

COURT OF APPEALS

DAVID KWIATKOWSKI,

Plaintiff-Appellee,

v

COACHLIGHT ESTATES OF BLISSFIELD, INC., and DANIEL D. RUPP,

Defendants-Appellants.

UNPUBLISHED
July 3, 2007

No. 272106
Lenawee Circuit Court
LC No. 05-001891-NO

Before: Servitto, P.J., and Jansen and Schuette, JJ.

JANSEN, J. (*dissenting*).

I must respectfully dissent. In general, the rules of the common law apply in this state until altered or abrogated. Const 1963, art 3, § 7. The common law "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); see also *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 364; 663 NW2d 514 (2003). This rule derives from the common-law principle that every person is under the general duty to act, or to use that which he controls, so as not to injure another. *Johnson v A&M Custom Built Homes of West Bloomfield*, 261 Mich App 719, 722; 683 NW2d 229 (2004).

Whether a defendant owes an actionable legal duty to a plaintiff is a question of law for the court. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999).

> "In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach." [*Id*. at 14-15, quoting *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997).]

After reviewing these relevant factors, I agree with the trial court's observation that defendant generally owed the common-law duty "to not slam a door into someone." See *Clark*, *supra* at

261. The trial court correctly determined as a matter of law that defendant owed plaintiff a common-law duty of ordinary care in this case. *Cipri*, *supra* at 14-15.

I am fully aware that the mere occurrence of an accident is not, in and of itself, evidence of negligence, and that the plaintiff must present some facts to directly or circumstantially establish a breach of the duty of care. See *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8-9; 279 NW2d 318 (1979). However, assuming that reasonable minds could differ on the issue of breach, it is for the jury to determine whether a defendant's conduct fell below the standard of care. *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000). Among other things, plaintiff presented evidence tending to establish that the door was not opaque, and that defendant would have been able to see plaintiff approaching had he looked through the door. Nonetheless, plaintiff also presented evidence that despite these facts, defendant apparently did not look through the door, and instead opened it suddenly. Surely, defendant could have avoided striking plaintiff altogether had he simply looked before opening the door. The record evidence was more than sufficient to establish a genuine issue of fact with respect to whether defendant breached the duty owed to plaintiff. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (a genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ). Accordingly, the trial court properly concluded that the issue of breach should be submitted to a jury. *Case*, *supra* at 7.

Finally, despite the majority's suggestion to the contrary, I conclude that plaintiff's claim sounded in ordinary negligence rather than premises liability. The majority writes:

> [P]laintiff was not injured by the door hitting his face and chest. Rather, plaintiff was injured by his fall once he lost his balance on the small porch and when his foot caught under the door. The small porch and the slight gap between the porch and the door are conditions on the land. Thus, plaintiff's claim arguably sounds in premises liability, not general negligence.

I disagree. Plaintiff's claim is based on defendant's alleged negligence in opening the door—not defendant's failure to protect him from dangerous conditions on the land. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). "Plaintiff does not rely on premises-liability principles in this appeal." *Id.* Instead, he relies on the common-law general duty of care, "which derives from ordinary-negligence principles rather than premises-liability theory." *Id*. at 615-616. Moreover, the inability to foresee the *precise manner* in which plaintiff's injury occurred is not fatal to plaintiff's ordinary negligence claim. *Id*. at 614 n 3. "A plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that some injury to the plaintiff was foreseeable or to be anticipated." *Schultz v Consumers Power Co*, 443 Mich 445, 452-453 n 7; 506 NW2d 175 (1993). Plaintiff's claim sounded in ordinary negligence only. *Hiner*, *supra* at 615-616.

I would affirm the trial court's denial of summary disposition in this case.

/s/ Kathleen Jansen